Supreme Court, U.S.
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No. _____

In The
Supreme Court of the United States

SONIA LaFONTAINE,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Second Circuit

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Whether the Court of Appeals' decision affirming Petitioner's conviction should be reversed because this Court's holding in *Crawford v. Washington*, __ U.S. __, 124 S.Ct. 1354 (2004), applying the Confrontation Clause of the Sixth Amendment to the Constitution, has invalidated the Court of Appeals's ruling that permitted the government's introduction of plea allocutions of co-conspirators who were unavailable to testify and could not be cross-examined by the defendant at trial; and

2. Whether the District Court's preclusion of certain tape recordings Petitioner sought to introduce at trial on the ground that they were not sufficiently authenticated under Rule 901, Fed.R.Evid., denied Petitioner her Fifth Amendment right to present a defense.

LIST OF PARTIES

All of the parties to the proceeding in the court whose judgment is sought to be reviewed are listed in the caption of the case appearing on the cover of this Petition.

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OPINION BELOW

The Summary Order of the United States Court of Appeals for the Second Circuit affirming the Judgment of the District Court, dated February 12, 2004, is reproduced herein as Appendix A. That Summary Order was not selected for publication in the Federal Reporter.

BASIS FOR JURISDICTION

The Summary Order of the Court of Appeals was entered on February 12, 2004. Petitioner Sonia LaFontaine did not file a Petition for a Rehearing *En Banc*. There has not been an application to extend the time period in which this Petition must be filed. Petitioner seeks review of a final decision by a Federal Circuit Court of Appeals in a criminal case. Thus, jurisdiction for the Petition exists pursuant to 28 U.S.C. § 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS CITED

Constitutional Provisions

AMENDMENT V

> No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a grand jury, except in cases arising in the land or naval forces, or in the militia, when in actual service in time of war or public danger; nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, not be deprived of life, liberty, or property,

without due process of law; nor shall private property by taken for public use, without just compensation.

AMENDMENT VI

In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been previously ascertained by law, and to be informed of the nature and cause of accusation; to be confronted with witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the Assistance of Counsel for his defence.

Statutory Provisions

Rule 901(a), Federal Rules of Evidence

(a) General Provision. The requirement of authentication or identification as a condition precedent to admissibility is satisfied by evidence sufficient to support a finding that the matter in question is what its proponent claims.

STATEMENT OF THE CASE

Introduction

This Court's decision and opinion in *Crawford v. Washington*, __ U.S. __, 124 S.Ct. 1354 (2004), has completely invalidated the premise upon which the Court of Appeals's decision – rendered three weeks prior to the announcement of this Court's opinion in *Crawford* – rests with respect to the admission of an unavailable co-defendant's guilty plea allocution against the Petitioner.

Indeed, as detailed below, in *Crawford* this Court not only cited guilty plea allocutions in particular as an example of "testimonial statements" that have been improperly admitted in contravention of the Sixth Amendment's right to confrontation, but specifically cited among the cases improvidently allowing such admission two of the very cases upon which the Court of Appeals relied in affirming the District Court's decision permitting introduction of the guilty plea allocution.

Therefore, quite plainly, Petitioner's conviction cannot survive *Crawford*. Accordingly, it is respectfully submitted that this Court should either grant certiorari and/or summarily reverse the Second Circuit's decision and remand the matter in light of and consistent with *Crawford*.

The Facts Below

Petitioner Sonia LaFontaine was convicted on July 12, 2000, after a jury trial, on 17 Counts of an 18 Count Superceding Indictment – charging a conspiracy to commit mail fraud and health care fraud, mail fraud, health care

fraud, witness tampering, conspiracy to engage in monetary transactions in criminally derived property, and engaging in monetary transactions in criminally derived property. On February 20, 2002, Petitioner was sentenced to 135 months' imprisonment. Petitioner was further ordered to pay $918,209 in restitution, and a forfeiture judgment in the amount of $105,784 was entered against her.

The government presented evidence at trial alleging that the LaFontaine-Rish Medical Associates, a Manhattan medical and surgery clinic (hereinafter "the Clinic"), was engaged in insurance fraud. During the period of the charged conspiracy, the government alleged that the Clinic submitted hundreds of false insurance claims for procedures not covered by insurance, procedures preformed by unlicensed employees, or procedures whose price was significantly inflated. Petitioner's defense was that to the extent such criminal conduct occurred, it was committed by others without her knowledge and/or illicit intent.

The government called 28 witnesses at trial and introduced hundreds of pages of records from the Clinic, insurance claims submitted to insurance companies, and bank records. The defense presented fifteen witnesses. However, the defense was unable to call its principal proposed witnesses, three doctors who worked at the Clinic and who could have established that Petitioner lacked both knowledge of any criminal conduct, and/or any criminal intent, and was therefore not guilty of the crimes charged. Because those witnesses were under indictment – or had indictments pending – and asserted their Fifth Amendment rights, their testimony was not available to Petitioner during her trial.

The Rish Allocution

One of those witnesses, Dr. Benito Rish, a "name" owner and founder of the clinic, had previously pleaded guilty on March 13, 2000, pursuant to a plea agreement with the government. However, Dr. Rish was required to allocute a second time after the District Court found that his initial plea allocution before the Magistrate was not sufficiently specific. Over defense objection, that second allocution was admitted against Petitioner at trial.

Since Dr. Rish had invoked his Fifth Amendment privilege not to testify, he was unavailable. As a result, Petitioner was denied the opportunity to cross-examine Dr. Rish, or to challenge his guilty plea allocution in any effective manner. That prejudice was compounded by the government's reference to that allocution during its closing argument and its allegation that the defense failed to present any evidence to refute the allocution.

The District Court's Refusal to Admit Audiotapes Into Evidence

Defense counsel also sought to admit into evidence audiotapes containing dictation by the doctors who had performed medical procedures at the Clinic. One set of those tapes contained dictation of Dr. Spektor, who was also under indictment. Based on another witness's testimony earlier in the trial, the government had stipulated that it was in fact Dr. Spektor's voice on the tapes. Additionally, the text of reports prepared by the doctor which exactly matched the language on the tapes that had already been introduced into evidence.

However, when the defense sought to introduce those tapes in order to rebut testimony of witnesses who had already testified, the District Court refused to admit the tapes

and stated that the only person who could authenticate the tapes was Dr. Spektor. Tr. 2163. However, Dr. Spektor, like Dr. Rish, was under indictment – and would later plead guilty pursuant to a plea agreement with the government – and indicated he would assert his Fifth Amendment rights.

The defense again argued that the tapes should be introduced as business records, and the District Court again denied the request, stating that "once doubts are raised [about authenticity], then you need the people who created the record." Tr. 2164.

The Court of Appeals's Decision Below

In affirming the District Court's decision to allow the introduction of the co-conspirator's plea allocution, the Second Circuit noted that

> [p]lea allocutions of co-conspirators have routinely been introduced into evidence without the attendant requirement that the pleading co-conspirator testify at another defendant's trial. *United States v. Petrillo,* 237 F.39 119 (2nd Cir. 2000); *United States v. Moskowitz*, 215 F.3d 265 (2nd Cir. 2000). This is particularly the case where, as here, the pleading co-conspirator has not been granted immunity, and therefore, is free to invoke his Fifth Amendment right not to testify.

United States v. LaFontaine, 2004 WL 260645 at **1.

The Court of Appeals also held that there was no reason why the District Court should have granted the

pleading co-conspirator immunity to allow the defense to cross-examine him based on his plea allocution. *Id.*

In addition, the Court of Appeals affirmed the District Court's refusal to allow the defense to authenticate tape recordings, holding that the District Court "invited LaFontaine to use alternative means to authenticate the tapes, and she failed to do so." *United States v. LaFontaine*, 2004 WL 260645 at **2.

This Court's Holding in* Crawford v. Washington, *__ U.S. __, 124 S.Ct. 1354 (2004)

On March 8, 2004, three weeks after the Second Circuit affirmed Petitioner's conviction, this Court issued its Opinion in *Crawford v. Washington,* __ U.S. __, 124 S.Ct. 1354 (2004), reversing the decision of the Supreme Court of Washington State, which had allowed in evidence a statement made to police by a defendant's wife, who was unavailable to testify at trial because of the State's marital privilege.

In doing so, this Court overturned its holding in *Ohio v. Roberts,* 448 U.S. 56 (1980), which allowed introduction of an unavailable witness's's statement if it bore an "adequate indicia of reliability." *Id.* at 66 (internal quotations omitted). Instead, the *Crawford* Court held that the Sixth Amendment's Confrontation Clause was a "bedrock procedural guarantee," *Crawford*, 124 S.Ct. at 1359, and that "[w]here testimonial statements are at issue, the only indicium of reliability sufficient to satisfy constitutional demands is the one the Constitution actually prescribes: confrontation." *Id.* at 1374.

The instant Petition followed.

REASONS FOR GRANTING THE WRIT

1. THIS COURT'S OPINION IN *CRAWFORD V. WASHINGTON*, __ U.S. __, 124 S.Ct. 1354 (2004), EXPLICITLY PROHIBITS, UNDER THE CONFRONTATION CLAUSE OF THE CONSTITUTION, THE INTRODUCTION OF PLEA ALLOCUTIONS OF CO-CONSPIRATORS WHO ARE UNAVAILABLE TO TESTIFY AND CANNOT BE CROSS-EXAMINED BY THE DEFENDANT

As detailed below, this Court's opinion in *Crawford* completely and expressly eviscerates the foundation of the Second Circuit's decision that guilty plea allocutions by non-testifying co-defendants can be introduced without offending the Sixth Amendment's Confrontation Clause. Consequently, it is respectfully submitted that this Court should grant certiorari and/or summarily reverse and remand the matter in light of and consistent with *Crawford*.

In upholding the District Court's admission of Dr. Rish's plea allocution, the Second Circuit explained that "[p]lea allocutions of co-conspirators have routinely been introduced into evidence without the attendant requirement that the pleading co-conspirator testify at another defendant's trial." *LaFontaine*, 2004 WL 260645 at **1, *citing United States v. Petrillo*, 237 F.3d 119 (2nd Cir. 2000); *United States v. Moskowitz*, 215 F.3d 265 (2nd Cir. 2000). Both *Petrillo* and *Moskowitz* involved plea allocutions which were held admissible because they satisfied the requisites of trustworthiness under the federal Rules of Evidence – the test under *Roberts*.

However, in *Crawford,* this Court, in discussing the *Roberts* test's "demonstrated capacity to admit core testimonial statements that the Confrontation Clause plainly meant to exclude," *Crawford*, 124 S.Ct. at 1362, cited *both* of those Second Circuit cases as examples of Courts *improperly* admitting "plainly testimonial statements despite the opportunity to cross-examine." *Crawford*, 124 S.Ct. at 1362, *citing United States v. Aguilar,* 295 F.3d 1018, 1021-1023 (9th Cir. 2002) (plea allocution showing existence of conspiracy); *United States v. Centracchio*, 265 F.3d 518, 527-530 (7th Cir. 2001) (same); *United States v. Dolah*, 245 F.3d 98, 104-105 (2nd Cir. 2001) (same); *United States v. Petrillo*, 237 F.3d 119, 122-123 (2nd Cir. 2000) (same); *United States v. Moskowitz,* 215 F.3d 265, 268-169 (2nd Cir. 2000) (same) (further citations omitted).

Thus, this Court explicitly and specifically removed the very underpinning of the Second Circuit's decision in this case with respect to the guilty plea allocutions that were admitted against Petitioner. In addition, this Court in *Crawford* described the *Roberts* test as a "malleable standard", which "often fails to protect against paradigmatic confrontation violations." *Crawford*, 124 S.Ct. at 1369. As this Court explained, such a standard is clearly at odds with "[t]he central concern of the Confrontation Claus [which] is to ensure the reliability of the evidence against a criminal defendant by subjecting it to rigorous testing in the context of an adversary proceeding before the trier of fact." *Lilly v. Virginia,* 527 U.S. 116, 123-124 (1999), *quoting Maryland v. Craig,* 497 U.S. 836, 845 (1990).

This Court in *Crawford* further examined the historical underpinnings of the Confrontation Clause, noting that, "the principal evil at which the Confrontation Clause

was directed was the civil-law mode of criminal procedure, and particularly its use of *ex parte* examinations as evidence against the accused." *Crawford*, 124 S.Ct. at 1363. Thus, the Confrontation Clause was designed and implemented to protect the right of a defendant to force a declarant to submit to cross-examination, which has been described by this Court as "the greatest legal engine ever invented for the discovery of truth." *Lilly v. Virginia,* 527 U.S. 116, 124 (1999), *quoting Maryland v. Craig,* 497 U.S. 836, 845 (1990).

Yet, here below, the Second Circuit affirmed the District Court's decision to allow the government to introduce testimonial statements – the plea allocution – even though the defendant was deprived of any opportunity to cross-examine the declarant or effectively challenge the veracity of that testimony because the declarant, who had not yet been sentenced, asserted his Fifth Amendment privilege.

Nor does the fact that the statement at issue was elicited during a plea allocution negate the constitutional violation. In fact, as this Court pointed out in *Crawford*, the context in which the statements were made directly implicate the Confrontation Clause, and indeed aggravate the denial of confrontation. As this Court recognized in *Crawford*,

> [t]hat inculpating statements are given in a testimonial setting is not an antidote to the confrontation problem, but rather the trigger that makes the Clause's demands most urgent. It is not enough to point out that most of the usual safeguards of the adversary process attend the statement, when the single safeguard missing is the one the Confrontation Clause demands.

Crawford, 124 S.Ct. at 1372.

In *Crawford*, this Court also made clear that the right to confrontation applies to *all* testimonial evidence adduced against the defendant, regardless of its origin, stating that the Court "once again reject[s] the view that the Confrontation Clause applies of its own force only to in-court testimony, and that its application to out-of-court statements introduced at trial depends upon 'the law of Evidence for the time being.'" *Crawford*, 124 S.Ct. at 1364, *quoting* 3 J. Wigmore Evidence § 1397, p. 101 (2d ed. 1923).

The Court in *Crawford* did not precisely define what constitutes 'testimonial' statements, but did explain that "[r]egardless of the precise articulation, some statements qualify under any definition – for example, *ex parte* testimony at a preliminary hearing." *Crawford*, 124 S.Ct. at 1364. The plea allocution in the instant case fits squarely into that category. In fact, it constitutes a "testimonial" statement far more than did the unsworn statement to police that was at issue in *Crawford*. *Crawford*, 124 S.Ct. at 1374 ("[w]hatever else the term covers, it applies at a minimum to prior testimony at a preliminary hearing, before a grand jury, or at a former trial; and to police interrogations").

Indeed, as note **ante**, at 9, this Court's opinion in *Crawford* explicitly cites guilty plea allocutions as an example type of testimonial statement that – improperly – has found its way into criminal trials as an accepted practice. *Crawford*, 124 S.Ct. at 1362 (citations omitted).

That conclusion is inevitable, since a plea allocution falls precisely within the accepted definition of "testimony," which is typically '[a] solemn declaration or affirmation

made for the purpose of establishing or proving some fact.'" *Crawford*, 124 S.Ct. at 1364, *quoting* 1 N. Webster American Dictionary of the English Language (1928).

The historical context of the Confrontation Clause also indicates that the Framers would have considered a plea allocution to be testimonial evidence that should not be admitted against a defendant at trial because, as this Court explained, "[t]estimonial materials" include "affidavits depositions, *prior testimony, or confessions,*" which were the type of materials "historically abused by prosecutors as a means of depriving criminal defendants of the benefit of the adversary process." *White v. Illinois,* 501 U.S. 346, 365 (1992) (THOMAS, J., joined by SCALIA, J., concurring in part and concurring in judgment) (emphasis added).

Here, the plea acllocution was a pre-conceived, coached, and scripted statement which was sworn to under oath and intended by the government to be used at a subsequent trial. The statements are also analogous to the *ex parte* affidavits presented in early English proceedings, against which the Confrontation Clause was specifically designed to protect. Thus, a plea allocution falls squarely into the gateway of the Confrontation Clause; *see Lilly v. Virginia,* 527 U.S. 116, 125 (1999) (statements were obviously obtained for purpose of creating evidence for use at future trial and are akin to *ex parte* affidavits, bringing the Confrontation Clause into play no matter how narrowly its gateway is read); and the Constitutional requirements are clear. *See Crawford*, 124 S.Ct. at 1374 ("[w]here testimonial evidence is at issue . . . the Sixth Amendment demands what the common law required: unavailability and a prior opportunity for cross examination").

Moreover, the District Court and the Second Circuit correctly found that the pleading co-conspirator was "unavailable" to testify based on his Fifth Amendment privilege. Rule 804(a) of the Federal Rules of Evidence provides that a claim of privilege will satisfy the "unavailability" requirement of the various exceptions to the prohibition against hearsay. The Courts have also repeatedly held that a witness becomes unavailable upon a claim of Fifth Amendment privilege. *See United States v. Dolah*, 245 F.3d 98 (2nd Cir. 1991) (witness who invokes privilege against self-incrimination is unavailable within meaning of hearsay exception); *United States v. Peterson,* 100 F.3d 7, 13 (2nd Cir. 1996) ("[i]n general, a person who invokes his Fifth Amendment privilege, leaving others powerless to compel his testimony, is considered to be unavailable"); *See also United States v. Bahadar*, 954 F.2d 821, 828 (2nd Cir. 1992); *United States v. Zurosky,* 614 F.2d 779 (1st Cir. 1979); *United States v. Thomas,* 571 F.2d 285 (5th Cir. 1978); *United States v. Silverstein*, 732 F.2d 1338 (7th Cir. 1984); *United States v. Pelton,* 578 F.2d 701 (8th Cir. 1978); *United States v. Milano*, 443 F.2d 1022 (10th Cir. 1971).

Accordingly, it is respectfully submitted that the District Court's admission of the Rish plea allocution against Petitioner at trial was unconstitutional and a new trial should be had.

2. THIS COURT SHOULD DECIDE WHETHER THE PRECLUSION OF TAPE RECORDINGS ON GROUNDS OF AUTHENTICATION DENIED PETITIONER HER FIFTH AMENDMENT RIGHT TO PRESENT A DEFENSE.

The Second Circuit also erred in rejecting Petitioner's claim that the defense was unable to authenticate the audiotapes it sought to introduce because the doctors heard on the tapes were unavailable to testify. In rejecting that claim, the Second Circuit reasoned that "[t]he [District] Court invited LaFontaine to use alternative means to authenticate the tapes, and she failed to do so." *United States v. LaFontaine,* 2004 WL 260645 (2nd Cir. 2004) at **2.

However, the District Court had actually ruled that because it found "sufficient doubt" as to the authenticity of the tapes, "absent firsthand testimony by the person who made the document [the tape]," they would not be admitted. Tr. 2163. The District Court made that ruling knowing full well that the doctor who dictated the tape, Dr. Spektor, was subject to indictment and would not testify based on his Fifth Amendment privilege.[1]

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[1] Even if the District Court had permitted the defense to call other witnesses involved in the chain of authentication (of the tapes), the chain of custody for authentication purposes is only as strong as its weakest link. Here, the weakest link, posited as a necessary link by the District Court, would have been the unavailable declarant whose testimony Petitioner could not have compelled.

Further, the District Court's concerns affected only the *weight* of the evidence, and not its threshold admissibility. The government had previously stipulated that the voice on the tapes was Dr. Spektor and any further dispute was a matter for the jury to decide.

In fact, Rule 901(a) of the Federal Rules of Evidence requires only that the proponent of that evidence submit "evidence sufficient to support a finding that the matter in question is what its proponent claims." That requirement is satisfied if "sufficient proof has been introduced so that a reasonable juror could find in favor of authenticity or identification." *United States v. Ruggiero*, 928 F.2d 1289, 1303 (2nd Cir. 1991), *quoting* 5 J. Weinstein & M. Berger, Weinstein's Evidence ¶901(a), at 901-17 (1990); *see also United States v. Dhinsa,* 243 F.3d 635, 659 (2nd Cir. 2001) (same). In fact, Rule 901 "does not erect a particularly high hurdle," *United States v. Ortiz,* 966 F.2d 707, 716 (1st Cir. 1992), and the proponent need not "rule out all possibilities inconsistent with authenticity, or to prove beyond any doubt that the evidence is what it purports to be." *United States v. Pluta,* 176 F.3d 43, 49 (2nd Cir. 1999).

However, here, the District Court impermissibly raised that threshold beyond what Petitioner could possibly meet, stating that the tapes could be authenticated *only* by the person who made them. Such an increased burden on the defense certainly constitutes error, but prejudiced the Petitioner even more significantly because the only person the District Court would have allowed to authenticate the tapes was unavailable. Such an unduly restrictive standard runs afoul of the generous authentication standards embodied in Rule 901.

Further, the District Court's refusal to admit the tapes also violated Petitioner's Due Process right to present her defense under the Fifth Amendment. *See California v. Trombretta*, 467 U.S. 479, 485 (1984) (Court has "long interpreted [Due Process Clause's] standard of fairness to require that criminal defendants be afforded a meaningful opportunity to present a complete defense").

As a result, the District Court's standard for authentication exceed that required under Rule 901, and in requiring Petitioner to call (without success) an unavailable witness in order to establish authentication, the District Court magnified its error.[2] The consequence was that Petitioner was deprived of her Fifth Amendment right to present a defense.

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[2] Indeed, this situation represents the converse of *Crawford*: while in *Crawford* the lower courts *permitted* the improper introduction of the guilty plea allocution, in contravention of the Sixth Amendment's right to confrontation, due to the declarant's unavailability, in this instance Dr. Spektor's unavailability *prevented* Petitioner from calling him to satisfy the District Court's inappropriately high standard for authentication, thereby denying Petitioner her Fifth Amendment right to present a defense.

Conclusion

Therefore, for all the reasons set forth above, it is respectfully submitted that this Petition for a Writ of Certiorari should be granted, and/or the Court of Appeals's decision summarily reversed in light of *Crawford*, and remanded for proceedings consistent therewith.

Dated: May 11, 2004
New York, New York

Respectfully submitted,

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87 Fed.Appx. 776

This case was not selected for publication in the Federal Reporter.

THIS SUMMARY ORDER WILL NOT BE PUBLISHED IN THE FEDERAL REPORTER AND MAY NOT BE CITED AS PRECEDENTIAL AUTHORITY TO THIS OR ANY OTHER COURT, BUT MAY BE CALLED TO THE ATTENTION OF THIS OR ANY OTHER COURT IN A SUBSEQUENT STAGE OF THIS CASE, IN A RELATED CASE, OR IN ANY CASE FOR PURPOSES OF COLLATERAL ESTOPPEL OR RES JUDICATA.

United States Court of Appeals,
Second Circuit.

UNITED STATES of America, Appellee,
v.
Sonia LAFONTAINE, aka "Sonia Fromme,"
Defendant-Appellant, Arthur Kissel,
aka "Arthur Fromme," Defendant.

No. 02-1232.

Feb. 12, 2004.

UPON DUE CONSIDERATION of this appeal from the United States District Court for the Southern District of New York (Mukasey, C.J.), it is hereby ORDERED, ADJUDGED, AND DECREED that the judgment of the district court is AFFIRMED.

Julia Pamela Heit and Vivian Shevitz, New York, NY, for Appellant.

Paul B. Radvany, Assistant United States Attorney (James B. Comey, United States Attorney for the Southern District of New York, on the brief; Gary Stein, Assistant

United States Attorney, of counsel), New York, NY, for Appellees.

PRESENT: *LEVAL, SOTOMAYOR,* and *WESLEY,* Circuit Judges.

SUMMARY ORDER

Defendant-appellant **Sonia LaFontaine** appeals from a judgment of conviction and subsequent sentence imposed by the United States District Court for the Southern District of New York (Mukasey, C.J.), following a six-week jury trial. The charges presented at trial all related to insurance fraud and money laundering schemes involving LaFontaine's cosmetic surgery clinic, LaFontaine-Rish Medical Associates ("LRMA"). On appeal, LaFontaine raises various challenges to her conviction and sentence, all of which we find to be without merit.

LaFontaine argues that, as part of its plea agreement with Dr. Rish, whereby the government was permitted to introduce Rish's plea allocution as evidence against LaFontaine, the government was obliged to immunize Rish, or otherwise require him to testify at LaFontaine's trial. Because LaFontaine never raised this claim before the district court, we review for plain error, *United States v. Brown,* 352 F.3d 654, 663 (2d Cir.2003); *see also United States v. Crowley,* 318 F.3d 401, 415 (2d Cir.2003) (defining "plain error" as that which is a "clear or obvious deviation from current law that affected the outcome of the district court proceedings") (internal quotation marks omitted), and find none. Plea allocutions of co-conspirators have routinely been introduced into evidence without the attendant requirement that the pleading co-conspirator testify at another defendant's trial. *See United States v. Petrillo,* 237 F.3d 119 (2d Cir.2000); *United States v. Moskowitz,* 215 F.3d 265 (2d Cir.2000). This

is particularly the case where, as here, the pleading co-conspirator has not been granted immunity, and therefore, is free to invoke his Fifth Amendment right not to testify. To the extent that LaFontaine argues that the district court should have compelled Rish's immunization, this claim is unavailing. "Absent extraordinary circumstances, the Due Process Clause imposes no requirement that defense witness immunity be ordered" by the court. *United States v. Diaz,* 176 F.3d 52, 115 (2d Cir.1999) (internal quotation marks and citation omitted). Where, as here, "the witness [himself] is a prosecution target," such extraordinary circumstances do not exist. *United States v. Shandell,* 800 F.2d 322, 324 (2d Cir.1986). Moreover, because LaFontaine did not demonstrate that Dr. Rish's testimony would have been exculpatory or otherwise material to her defense, the district court was under no obligation to compel Rish's immunization.[1]

LaFontaine also challenges the district court's decision to exclude dictation tapes, which she claims were "made by doctors who had performed medical procedures on patients named in the indictment," for lack of authentication. Reviewing the district court's exclusion of the tapes for abuse of discretion, *United States v. Taubman,* 297 F.3d 161, 164 (2d Cir.2002), we find none. LaFontaine argues that she was unable to authenticate the tapes, as required by Fed.R.Evid. 901(a), because the doctors heard on the tapes were unavailable to testify. The court, however, invited LaFontaine to use

[1] We note that, in her brief, LaFontaine argued that the district court should have compelled the government to immunize Drs. Spektor and Zizza in order to permit them to testify at trial. At oral argument, however, LaFontaine conceded that this claim was without merit, as Drs. Zizza and Spektor had not reached agreements with the government at the time of trial.

alternative means to authenticate the tapes, and she failed to do so. To the extent that LaFontaine argues that the tapes were admissible under Rule 806 for impeachment purposes, such a claim was not raised below, and is now reviewed for plain error. *See Crowley,* 318 F.3d at 414. Because the government did not introduce hearsay statements by the doctors at trial, the challenged tapes could not have been used for impeachment purposes. Further, because LaFontaine has failed to show that introduction of the tapes would have resulted in her acquittal, there was no plain error.

LaFontaine next contends that the district court abused its discretion by excluding certain witness testimony on the ground that it was irrelevant or cumulative. Trial courts enjoy broad discretion over the admission of evidence, and this Court "will second-guess a district court only if there is a clear showing that the court abused its discretion or acted arbitrarily or irrationally." *United States v. Salameh,* 152 F.3d 88, 110 (2d Cir.1998) (internal quotation marks omitted). There is no such showing here. In our view, the excluded testimony of the various prospective witnesses was either irrelevant, cumulative, collateral, or at worst harmless error.

LaFontaine also claims that the district court's refusal to adjourn the trial and authorize the deposition of Arthur Kissel, LaFontaine's husband and co-defendant, constituted an abuse of discretion because it "undermined [her] right to present a balanced defense." The decision to permit or deny leave to conduct a Rule 15 deposition "rests within the sound discretion of the trial court." *United States v. Gigante,* 166 F.3d 75, 81 (2d Cir.1999) (internal quotation marks and citation omitted). There is no indication that the district court's decision constituted an abuse of discretion.

LaFontaine also contends that the district court abused its discretion by excluding statements made by Dr. Rish and Kissel to Kristine Haave, the fraud investigator who testified at trial. These statements, LaFontaine maintains, were admissible under Rule 801(d)(2)(E) as statements by a co-conspirator made in furtherance of a conspiracy. Because Rule 801(d)(2)(E), however, requires that the party against whom the statement is offered be a party to the conspiracy, it is clear that such a statement may not be introduced against the government in a criminal case. *See United States v. Abbas,* 74 F.3d 506, 511 (4th Cir.1996); *United States v. Kapp,* 781 F.2d 1008, 1014 (3d Cir.1986). To the extent that LaFontaine argues that the statements were also admissible under Rule 806, this argument was not raised below, and we find no plain error in the district court's ruling. Rule 806 permits the use of such evidence for impeachment purposes; here, however, LaFontaine sought to introduce the statements to prove the truth of the matter asserted – that Kissel and Rish committed the billing fraud. Further, LaFontaine fails to show that she was unduly prejudiced by the exclusion, as the "exculpatory" nature of the statements is not apparent. Thus, these statements were properly excluded.

We reject LaFontaine's claim that the district court abused its discretion by excluding expert testimony that certain medical procedures could be delegated to unlicensed individuals on the ground that the testimony was irrelevant to the issues presented at trial. For substantially the reasons stated by the district court at trial, the proposed expert testimony was irrelevant to the fraud issues raised at trial and was properly excluded. To the extent that LaFontaine objects to the district court's decision not to charge the jury on the permissibility of delegation to unlicensed individuals under New York law, we also reject her claim. LaFontaine

has not shown that the requested charge "accurately represented the law in every respect," and that she was prejudiced by the charge given. *United States v. Mulder,* 273 F.3d 91, 105 (2d Cir.2001). Indeed, the requested charge was an incorrect statement of New York law, and LaFontaine was not prejudiced by the charge given, as the district court properly charged the jury on all of the elements of the government's case. Accordingly, LaFontaine's claim fails.

LaFontaine challenges her sentence on a number of grounds. First, she argues that the district court erred in denying her a *Fatico* hearing, thereby precluding her from presenting evidence concerning her role in the offense and the amount of loss for which she was responsible. Reviewing the district court's decision for abuse of discretion, *United States v. Slevin,* 106 F.3d 1086, 1091 (2d Cir.1996) (noting that the district court enjoys broad discretion to determine the procedure by which sentencing issues will be resolved, so long as the defendant is given the opportunity to rebut the government's allegations), we find none. Where, as here, the district court concluded that the defendant had ample opportunity at trial and in her sentencing submissions to rebut the government's allegations concerning role and loss amount, it was under no obligation to hold a *Fatico* hearing.

Second, LaFontaine also contends that the sentencing court improperly calculated the loss involved in the offense. Specifically, LaFontaine claims that the court should have discounted the "intended loss" – the full amount of LaFontaine's fraudulent claims – because LaFontaine knew when the claims were submitted that LRMA would not be reimbursed for the full amount. She further argues that, because the patients received some treatment, the intended loss figure should be discounted to reflect the amount that would have been reimbursed by the insurance companies for the

procedures that were actually performed. We find no clear error in the district court's calculation. *United States v. Franklyn,* 157 F.3d 90, 97 (2d Cir.1998). The district court need not compute the loss sustained "with precision," but rather, "need only make a reasonable estimate of the loss, given the available information." *United States v. Jacobs,* 117 F.3d 82, 95 (2d Cir.1997) (quotation marks and citation omitted). For substantially the reasons set forth by the court at sentencing, we agree that the government's loss calculation was a conservative calculation upon which the court could rely in determining the loss amount.

Third, LaFontaine also argues that the district court's upward departure for multiple acts of obstruction of justice was improper, and that the court should have imposed the standard two-level departure mandated by U.S.S.G. § 3C1.1. Although § 3C1.1 provides a two-level enhancement for obstruction of justice, it is well settled that a sentencing court may depart upwardly if a defendant engages in "multiple acts of obstruction" that fall outside the heartland conduct contemplated by § 3C1.1. *United States v. Ventura,* 146 F.3d 91, 97 (2d Cir.1998). Reviewing the sentencing court's decision to depart upwardly for reasonableness, *see* 18 U.S.C. § 3742(e)(3)(c), we find that, for substantially the reasons stated by the court at sentencing, the court's six-level enhancement was eminently reasonable given LaFontaine's various and numerous acts of obstruction.

Fourth, LaFontaine further contends that the district court's imposition of a two-level enhancement for conscious or reckless risk of serious bodily injury was an abuse of discretion because the injuries claimed by LRMA patients were "normal complaints of surgical recovery," and the procedures performed by LaFontaine did not pose a risk of serious bodily injury. For substantially the

reasons provided by the court at sentencing, we agree that LaFontaine's conduct exposed LRMA patients to "the conscious or reckless risk of serious bodily injury," U.S.S.C. § 2F1.1(b)(4)(A) (1997), and in some cases, actually resulted in injuries to patients. Accordingly, the two-level enhancement was proper.

Fifth, LaFontaine also maintains that the district court's imposition of U.S.S.G. § 3B1.1's leadership role enhancement was improper because she was not a leader or organizer of the conspiracy. She further claims that the sentencing court improperly relied on evidence related to the offense conduct, rather than her role in the offense, in determining whether the role enhancement was applicable. We disagree. The reasons set forth by the court at sentencing clearly indicate that the court properly applied the leadership enhancement.

Sixth, LaFontaine further maintains that the sentencing court's decision not to depart downwardly, based on the alleged disparity between her sentence and that of her coconspirators Drs. Rish and Spektor, was an unconstitutional application of the Sentencing Guidelines. We have established that a disparity in the sentences of codefendants "is not a proper basis for [a] downward departure," *United States v. Tejeda,* 146 F.3d 84, 87 (2d Cir.1998) (internal quotation marks omitted), even where the disparity is the result of prosecutorial discretion in the plea bargaining process, *United States v. Stanley,* 928 F.2d 575, 579-82 (2d Cir.1991). As the sentencing court noted, LaFontaine "was in a different position from that of the other defendants," as she profited from the scheme far more than did Drs. Rish and Spektor. Given these considerations, it is clear that the court's decision not to exercise its departure authority was not clearly erroneous.

Finally, LaFontaine contends that the sentencing court erred in failing to group the money laundering charges with the fraud charges, as required under the November 2001 Sentencing Guidelines. This claim is completely without merit. The sentencing court correctly applied the November 1997 Sentencing Guidelines, which did not require grouping of the fraud and money laundering charges, but were more favorable to LaFontaine than the November 2001 Sentencing Guidelines. *See United States v. Sabbeth,* 277 F.3d 94, 99 (2d Cir.2002) (requiring that the district court apply the Guidelines version in effect at the time of the offense conduct if it would result in a less severe sentence than the version in force at the time of sentencing). Under the November 1997 Sentencing Guidelines, money laundering and fraud charges are not grouped unless they are tightly interwoven and involve the same victims. *See* U.S.S.G. § 3D1.2(a) (1997). As the sentencing court noted here, the charges were not tightly interwoven and involved two different sets of victims – the insurance companies, and the banking system and society at large. Accordingly, the sentencing court's decision not to group these charges was appropriate.

For these reasons, the judgment of the district court is AFFIRMED.

UNITED STATES DISTRICT COURT
Southern District of New York

UNITED STATES OF AMERICA **V.** SONIA LAFONTAINE, a/k/a "Sonia Froom"	**JUDGMENT IN A CRIMINAL CASE** (For Offenses Committed On or After November 1, 1987) **Case Number:** S3 1:98CR.00251-001(MBM) John Pollok, Susan Wolffe and Roger Bennett Adler Defendant's Attorney

THE DEFENDANT:

pleaded guilty to count(s) _____

☐ pleaded nolo contendere to count(s) _____ which was accepted by the court

XX was found guilty on count(s) one through nine, eleven through eighteen, and the forfeiture allegation after a plea of not guilty

Title & Section	Nature of Offense	Date Concluded	Count Number(s)
18 U.S.C. § 371	Conspiracy to commit mail and health fraud	In or about early 1998	1
18 U.S.C. §§ 1341 and 2	Mail fraud	8/31/95	2

The defendant is sentenced as provided in pages 2 through 11 of this judgment. The sentence is imposed pursuant to the Sentencing Reform Act of 1984.

☐ The defendant has been found not guilty on count(s)

_____

Count(s) _____ ☐ is ☐ are dismissed on the motion of the United States

IT IS FURTHER ORDERED that the defendant shall notify the United States Attorney for this district within 30 days of any change of name, residence, or mailing address until all fines, restitution, costs, and special assessments imposed by this judgment are fully paid.

Defendant's Soc. Sec. No.: 584-03-7735

Defendant's Date of Birth: August 8, 1946

Defendant's USM No. 41537-054

Defendant's Residence Address:

61 West 62nd Street

Apartment 23F

New York New York 10023

Defendant's Mailing Address:

61 West 62nd Street

Apartment 23F

New York New York 10023

February 20, 2002
Date of Imposition of Judgment

/s/ [Illegible]
Signature of Judicial Officer

Michael B. Mukasey, U.S.D.J.
Name and title of Judicial Officer

March 15, 2001
Date

ADDITIONAL COUNTS OF CONVICTION

Title & Section	Nature of Offense	Date Offense Concluded	Count Number(s)
18 U.S.C. §§ 1341 and 2	Mail Fraud	10/24/95	3
18 U.S.C. §§ 1341 and 2	Mail Fraud	10/17/95	4
18 U.S.C. §§ 1341 and 2	Mail Fraud	10/18/94	5
18 U.S.C. §§ 1341 and 2	Mail Fraud	12/27/95	6
18 U.S.C. §§ 1341 and 2	Mail Fraud	5/20/96	7
18 U.S.C. §§ 1341 and 2	Mail Fraud	8/9/95	8
18 U.S.C. §§ 1341 and 2	Mail Fraud	10/20/95	9
18 U.S.C. §§ 1347 and 2	Health care fraud	In or about early 1998	11
18 U.S.C. §§ 1512(b)(3) and 2	Witness tampering	In or about late 1996	12
18 U.S.C. §§ 1512(b)(3) and 2	Witness tampering	In or about 1998	13
18 U.S.C. § 1956(h)	Conspiracy to engage in monetary transaction with criminally derived property	In or about 1998	14

18 U.S.C. §§ 1957 and 2	Engaging in monetary transactions with criminally derived property	12/11/95	15
18 U.S.C. §§ 1957 and 2	Engaging in monetary transactions with criminally derived property	2/23/96	16
18 U.S.C. §§ 1957 and 2	Engaging in monetary transactions with criminally derived property	4/2/96	17

RIDER A

Title & Section	Nature of Offense	Date Offense Concluded	Count #
18 U.S.C. §§ 1957 and 2	Engaging in monetary transactions with criminally derived property	6/27/96	18
18 U.S.C. § 982	Forfeiture Allegation	N/A	No #

On motion by the government the superseded indictment, and superseding indictments S1 98 Cr. 251 (MBM) and S2 98 Cr. 251 (MBM) are dismissed as to defendants Sonia LaFontaine; as is Count 10 of superseding indictment, S3 98 Cr. 251 (MBM).

IMPRISONMENT

The defendant is hereby committed to the custody of the United States Bureau of Prisons to be imprisoned for a total of 135 months.

X The court makes the following recommendations to the Bureau of Prisons:
Consistent with defendant's security classification as designated by the United States Bureau of Prisons and the length of her sentence, defendant should be assigned to a correctional facility as close to Florida as possible where she can receive appropriate medical treatment.

X The defendant is remanded to the custody of the United States Marshal.

☐ The defendant shall surrender to the United States Marshal for this district:

☐ at _____ ☐ a.m. ☐ p.m. on _____
as notified by the United States Marshal.

The defendant shall surrender for service of sentence at the institution designated by the Bureau of [sic] before 2 p.m. _____

☐ as notified by the United States marshal.

☐ as notified by the Probation or Pretrial Services Office.

RETURN

I have executed this judgment as follows:

_____

_____

_____

Defendant delivered on _____ to _____
at _____, with a certified copy of this judgment.

_____
UNITED STATES MARSHAL

By _____
DEPUTY U.S. MARSHAL

ADDITIONAL IMPRISONMENT TERMS

60 months on each of Count 1, 2, 3, 4, 5, 6, 7, 8, and 9; and 15 months on each of Counts 11, 12, 13, 14, 15, 16, 17, and 18. The terms of imprisonment imposed on each of Counts 2 through 9 are to run concurrent to one another and consecutive to the term of imprisonment imposed on Count 1; and the terms of imprisonment imposed on each of Counts 11 through 18 are to run concurrent to one another and consecutive to the terms of imprisonment imposed on Counts 1 through 9.

SUPERVISED RELEASE

Upon release from imprisonment, the defendant shall be on supervised release for a term of 4 years.

The defendant shall report to the probation office in the district to which the defendant is released within 72 hours of release from the custody of the Bureau of Prisons.

The defendant shall not commit another federal state or local crime.

The defendant shall not illegally possess a controlled substance.

For offenses committed on or after September 13, 1994:

The defendant shall refrain from any unlawful use of a controlled substance. The defendant shall submit to one drug test within 15 days of release from imprisonment and at least two periodic drug tests thereafter, as directed by the probation officer.

X The above drug testing condition is suspended based on the court's determination that the defendant poses a low risk of future substance abuse. (Check, if applicable.)

X The defendant shall not possess a firearm as defined in 18 U.S.C. § 921. (Check, if applicable.)

If this judgment imposes a fine or a restitution obligation, it shall be a condition of supervised release that the defendant pay any such fine or restitution that remains unpaid at the commencement of the term of supervised release in accordance with the Schedule of Payments set forth in the Criminal Monetary Penalties sheet of this judgment.

The defendant shall comply with the standard conditions that have been adopted by this court (set forth below). The defendant shall also comply with the additional conditions on the attached page.

STANDARD CONDITIONS OF SUPERVISION

1) the defendant shall not leave the judicial district without the permission of the court or probation officer;

2) the defendant shall report to the probation officer and shall submit a truthful and complete written report within the first five days of each month;

3) the defendant shall answer truthfully all inquiries by the probation officer and follow the instructions of the probation officer;

4) the defendant shall support his or her dependents and meet other family responsibilities;

5) the defendant shall work regularly at a lawful occupation unless excused by the probation officer for schooling, training, or other acceptable reasons;

6) the defendant shall notify the probation officer ten days prior to any change in residence or employment;

7) the defendant shall refrain from excessive use of alcohol;

8) the defendant shall not frequent places where controlled substances are illegally sold, used, distributed, or administered;

9) the defendant shall not associate with any persons engaged in criminal activity, and shall not associate with any person convicted of a felony unless granted permission to do so by the probation officer;

10) the defendant shall permit a probation officer to visit him or her at any time at home or elsewhere and shall permit confiscation of any contraband observed in plain view of the probation officer;

11) the defendant shall notify the probation officer within seventy-two hours of being arrested or questioned by a law enforcement officer;

12) the defendant shall not enter into any agreement to act as an informer or a special agent of a law enforcement agency without the permission of the court;

13) as directed by the probation officer, the defendant shall notify third parties of risks that may be occasioned by the defendant's criminal record or personal history of characteristics, and shall permit the probation officer to make such notifications and to confirm the defendant's compliance with such notification requirement.

ADDITIONAL SUPERVISED RELEASE TERMS

4 years on each of Counts 2 through 9 and 11, and 3 years on each of Counts 1, and 12 through 18; all to run concurrent to one another.

SPECIAL CONDITIONS OF SUPERVISION

During the time defendant is on supervised release defendant is to pay restitution, for which she is jointly and severally liable with Arthur Kissel, if convicted, Bernard Rish and Joseph Specktor, in the amount of $918,209.00 in monthly installments at a rate of 10 percent of her gross income into an account maintained by the Probation Office at the United States Courthouse, 500 Pearl Street, New York, New York 10007, for disbursement of restitution to victims listed on pages 8 through 9 of this judgment, pay the cost of supervised release during the time, if any, that her income exceeds $3,500.00 per month after taxes and after deducting restitution payments and then to the extent of 10 cents on the dollar up to the cost of supervised release, provide the Probation Office with access to financial information and seek the permission of the Probation Office before incurring new credit charges or opening any new lines of credit.

CRIMINAL MONETARY PENALTIES

The defendants shall pay the following total criminal monetary penalties in accordance with the schedule of payments set forth on Sheet 5, Part B.

	Assessment	Fine	Restitution
Totals:	$1,250.00	$	$ 918,209.00

☐ If applicable, restitution amount ordered pursuant to plea agreement .....$ _____

FINE

The above fine includes costs of incarceration and/or supervision in the amount of $ $ _____

The defendant shall pay interest on any fines more than $2,500, unless the fine is paid in full before the fifteenth day after the date of judgment, pursuant to 18 U.S.C. § 3612(f). All of the options on Sheet 5, Part B may be subject to penalties for default and delinquency pursuant to 18 U.S.C. § 3612(g).

X The court has determined that the defendant does not have the ability to pay interest and it is ordered that:

X The interest requirement is waived.

☐ The interest requirements is modified as follows:

RESTITUTION

☐ The determination of restitution is deferred until _____. An Amended Judgment in a Criminal Case will be entered after such determination.

The defendant shall make restitution to the following payees in the amounts listed below.

If the defendant makes a partial payment, each payment shall receive an approximately proportional payment unless specified otherwise in the priority order or percentage payment column below.

Name of Payee	*Total Amount of loss	Amount of Restitution Ordered	Priority Order or Percentage of Payment
Aetna	$203,703.00	$203,703.00	
Alden Life	$3,473.00	$3,473.00	
Blue Cross/ Blue Shield	$105,444.00	$105,444.00	
Chubb	$17,478.00	$17,478.00	
Cigna	$202,194.00	$202,194.00	
Extended Benefit	$10,141.00	$10,141.00	
GHI	$23,560.00	$23,560.00	
Great West	$29,849.00	$29,849.00	
Guardian	$90,221.00	$90,221.00	
Healthsource	$1,748.00	$1,748.00	
Oxford	$33,559.00	$33,559.00	
Mass Mutual	$3,789.00	$3,789.00	
NJHA	$10,535.00	$10,535.00	
NY Life	$8,850.00	$8,850.00	
Prucare	$2,372.00	$2,372.00	
Prudential	$19,770.00	$19,770.00	

* Findings for the total amount of losses are required under Chapters 109A, 110, 110A, and 113A of Title 18 for offenses committed on or after September 13, 1994 but before April 23, 1996.

UHC	$142,697.00	$142,697.00
Washington National	$8,827.00	$8,827.00
Totals:	$918,209.00	$918.209.00

SCHEDULE OF PAYMENTS

Payments shall be applied in the following order: (1) assessment; (2) restitution; (3) fine principal; (4) cost of prosecution; (5) interest; (6) penalties.

Payment of the total fine and other criminal monetary penalties shall be due as follows:

A X In full immediately; or

B ☐ $ _____ immediately, balance due (in accordance with C, D, or E); or

C ☐ not later than _____; or

D ☐ in installments to commence _____ days after the date of this judgment. In the event the entire amount of criminal monetary penalties imposed is not paid prior to the commencement of supervision, the U.S. probation officer shall pursue collection of the amount due, and shall request the court to establish a payment schedule if appropriate; or

E ☐ in _____ (*e.g., equal, weekly, monthly, quarterly*) installments of $_____ over a period of _ year(s) to commence _____ days after the date of this judgment.

The defendant will be credited for all payments previously made toward any criminal monetary penalties imposed.

Special instructions regarding the payment of criminal monetary penalties:

Defendant is to pay the $1,250.00 special assessment immediately. As for restitution the $105,784.00 ordered forfeited by the defendant and all of defendant's liquid assets as of February 20, 2002 are to be paid forthwith into an account maintained by the Probation Office at the United States Courthouse, 500 Pearl Street, New York, New York 10007 for disbursement of restitution to the victims listed on pages 8 and 9 of this judgment and defendant will make restitution payments in monthly installments at a rate of 10 percent of her gross income during the time that she is on supervised release.

The Court found that defendant does not have the ability to pay a fine or the costs of imprisonment and supervised release except as set forth on page 7 of this judgment.

☐ The defendant shall pay the cost of prosecution.

X The defendant shall forfeit the defendant's interest in the following property to the United States $105,794.00, which is to be disbursed as restitution payments to the victims through the account maintained by the Probation Office at the United States Courthouse for that purpose.

Unless the court has expressly ordered otherwise in the special instructions above, if this judgment imposes a period of imprisonment, payment of criminal monetary penalties shall be due during the period of imprisonment. All criminal monetary penalty payments, except those payments made through the Bureau of Prisons' Inmate Financial Responsibility Program, are to be made as directed by the court, the probation officer, or the United States attorney.

ADDITIONAL DEFENDANTS HELD JOINT AND SEVERAL

Case Number (Including Defendant Number)	Defendant Name	Joint and Several Amount
S3 1:98CR00251-002(MBM)	Arthur Kissel, if convicted	$318,209.00
1:00CR230-001(MBM)	Bernard Rish	$100,000.00
1:00CR00917-001(MBM)	Joseph Spektor	$28,585.00

STATEMENT OF REASONS

The court adopts the factual findings and guideline application in the presentence report.

OR

X The court adopts the factual finding and guideline application in this presentence report except (see attachment, if necessary):

SEE ATTACHED RIDER B AND ORDER

Guidelines Range Determined by the Court:

Total Offense Level: 33

Criminal History Category: 1

Imprisonment Range: 135 to 168 months

Supervised Release Range: 2 to 3 years on Cts 1, 12-18 to & 3 to 5 yrs on Cts. 2-9, 11 years

Fine Range: $ _____ to $ _____

X Fine waived or below the guideline range because of inability to pay.

Total Amounts of Restitution: $318,209.00

☐ Restitution is not ordered because the complication and prolongation of the sentencing process resulting from the fashioning of a restitution order outweighs the need to provide restitution to any victims, pursuant to 18 U.S.C. § 3663(d).

☐ For offenses committed on or after September 13, 1994 but before April 23, 1996 that require the total amount of loss to be stated, pursuant to Chapters 109A, 110, 110A, and 113A of Title 18, restitution is not ordered because the economic circumstances of the defendant do not allow for the payment of any amount of a restitution order, and do not allow for the payment of any or some portion of a restitution order in the foreseeable future under any reasonable schedule of payments.

☐ Partial restitution is ordered for the following reason(s):

☐ The sentence is within the guideline range, that range does not exceed 24 months, and the court finds no reason to depart from the sentence called for by the application of the guidelines.

OR

☐ The sentence is within the guideline range, that range exceeds 24 months, and the sentence is imposed for the following reasons:

OR

X The sentence departs from the guideline range:

upon motion of the government, as a result of defendant's substantial assistance.

X for the following specific reason(s).
SEE ATTACHED RIDER B

RIDER B

The Court found that the underlying fraud was more than $2.5 million but less than $5 million, and that the offense level before adjustments pursuant to U.S.S.G. § 2F1.1(a) and (b)(1) was 19 – 6 for fraud plus 13 for the amount of the fraud. The Court then made the following upward adjustments: (i) 2 points for more than minimal planning pursuant to USSG § 2F1.1(b)(2); (ii) 2 points for conduct involving the conscious risk of serious injury to others pursuant to U.S.S.G. § 2F1.1(b)(7)(A); (iii) 4 points for leadership role in an offense that included five or more participants pursuant to U.S.S.G. § 3B1.1(a); and (iv) 6 points for obstruction of justice pursuant to U.S.S. §§ 3C1.1 and 5K2.0. Accordingly, the Court found that the adjusted offense level to be 33; the criminal history category of I, and a sentencing range of 135-168 months.

(3)

AUG 13 2004
OFFICE OF THE CLERK

No. 03-1540

In the Supreme Court of the United States

SONIA LAFONTAINE, AKA SONIA FROMME, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

PAUL D. CLEMENT
Acting Solicitor General
Counsel of Record

CHRISTOPHER A. WRAY
Assistant Attorney General

THOMAS E. BOOTH
Attorney

Department of Justice
Washington, D.C. 20530-0001
(202) 514-2217

QUESTIONS PRESENTED

1. Whether the district court committed reversible plain error in admitting statements from the guilty plea allocution of petitioner's co-conspirator.

2. Whether the district court abused its discretion in excluding certain dictation tapes made by a co-conspirator.

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In the Supreme Court of the United States

No. 03-1540

SONIA LAFONTAINE, AKA SONIA FROMME, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINION BELOW

The opinion of the court of appeals (Pet. App. 1a-9a) is not published in the *Federal Reporter*, but is reprinted in 87 Fed. Appx. 776.

JURISDICTION

The judgment of the court of appeals was entered on February 12, 2004. The petition for a writ of certiorari was filed on May 11, 2004. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

Following a jury trial in the United States District Court for the Southern District of New York, petitioner was convicted of conspiracy to commit mail fraud and health care fraud, in violation of 18 U.S.C. 371; eight

counts of mail fraud, in violation of 18 U.S.C. 1341; one count of health care fraud, in violation of 18 U.S.C. 1347; two counts of witness tampering, in violation of 18 U.S.C. 1512(b)(3); one count of conspiracy to commit money laundering, in violation of 18 U.S.C. 1956(h); and four counts of money laundering, in violation of 18 U.S.C. 1957. She was sentenced to 135 months of imprisonment. The court of appeals affirmed. Pet. App. 1a-9a.

1. Petitioner and her husband, Arthur Kissel, owned and operated a Manhattan cosmetic surgery clinic, LaFontaine-Rish Medical Associates (LRMA). The evidence at trial showed that, from 1994 to 1998, petitioner and Kissel executed a massive health insurance fraud scheme. Gov't C.A. Br. 3-5.

LRMA was named for petitioner and Dr. Benito Rish. Rish spent little time at the clinic, which was run by petitioner and Kissel. Dr. Joseph Spektor worked part-time at the clinic. Petitioner and Kissel caused LRMA to submit hundreds of fraudulent health care claims that: (1) falsely billed various cosmetic procedures that were not covered by insurance as medically necessary procedures that were covered by insurance; (2) falsely represented that certain medical procedures performed by petitioner, who had no medical license or formal medical training, had been performed by licensed doctors who in fact had not met the patients involved; and (3) inflated bills to obtain reimbursement for services that had not been performed. Gov't C.A. Br. 3-20.

Rish pleaded guilty before petitioner's trial. At his plea hearing, Rish stated that he worked at LRMA from 1994 to 1997; that he knew that petitioner and others were submitting claims for procedures that were not covered by insurance; that he signed documents

that certain procedures had been performed when he knew that they had not been performed; and that those documents were submitted to insurance companies for reimbursement. At petitioner's trial, the government presented a redacted version of Rish's plea allocution hearing to the jury. The redacted version removed all references to petitioner and Kissel. The district court instructed the jury that it could consider Rish's statements as proof of the existence of the charged conspiracy and Rish's role in it, but not as evidence that petitioner participated in the conspiracy. Gov't C.A. Br. 35-37.

Five days after the deadline for producing documents and less than one month before trial, petitioner provided the government with copies of dozens of audio tapes that purported to be the dictations of various LRMA doctors, including Spektor. Spektor declined to testify at trial, asserting his Fifth Amendment privilege against compelled self-incrimination. Margarita Brice, an LRMA employee who was responsible for transcribing dictation tapes from doctors, testified that she observed Spektor dictating on numerous occasions, and that rather than dictating during the procedure or from memory, he merely read from the same paper "over and over again." Brice also testified that petitioner ordered Spektor to increase the number of lesions he allegedly removed. In addition, Brice stated that the doctors used miniature-sized cassettes for dictation, not regular-sized tapes like the ones provided by petitioner to the government. Gov't C.A. Br. 50-51.

During cross-examination of Brice, petitioner sought to admit the regular-sized tapes, arguing that they were admissible as business records and that they showed that a doctor was present during patient surgery. The government objected on the ground that the

tapes were not made contemporaneously with the procedures and that there was evidence that they had been created after the fact to conceal the fraud. The district court ruled that there was "sufficient doubt" concerning the authenticity of the tapes to justify their exclusion in the absence of testimony from Spektor. Further, in view of the possibility that the tapes were "created to establish some bogus evidence of what the doctor did," the court ruled that the business records exception to the hearsay rule did not apply. Gov't C.A. Br. 51-52.

2. The court of appeals affirmed. Pet. App. 1a-9a.

a. Petitioner argued that, because the government had used Rish's plea allocution testimony at trial, the government was required to immunize Rish to allow him to testify. Because petitioner had not raised that claim in the district court, the court of appeals addressed the claim under the plain error standard. The court of appeals found no plain error because its decisions had upheld the introduction of the plea allocutions of co-conspirators. Pet. App. 2a. The court explained that, absent extraordinary circumstances, there is no requirement for a court to order that a witness be granted immunity. The court further explained that the district court had no obligation to immunize Rish in this case because petitioner "did not demonstrate that Dr. Rish's testimony would have been exculpatory or otherwise material to her defense." *Id.* at 3a.

b. The court of appeals also rejected petitioner's claim that the district court had abused its discretion in excluding the dictation tapes. The court of appeals reasoned that, even if the doctors heard on the tapes were unable to testify about the tapes' authenticity, the district court had invited petitioner to use other means to authenticate the tapes, but she had failed do so. The court rejected petitioner's argument that the tapes

were admissible to impeach government witnesses. Reviewing that claim for plain error because petitioner had not made the argument in the district court, the court of appeals reasoned that the challenged tapes could not have been used for impeachment purposes because no hearsay statements of the doctors had been admitted at trial. Pet. App. 3a-4a.

ARGUMENT

1. Petitioner, relying on *Crawford* v. *Washington*, 124 S. Ct. 1354 (2004), contends (Pet. 8-13) that she is entitled to a new trial because the admission of Rish's plea allocution violated the Confrontation Clause of the Sixth Amendment. In *Crawford*, this Court held that the Confrontation Clause bars the admission of out-of-court statements that are "testimonial" in nature unless the witness is unavailable to testify and the defendant has had a prior opportunity for cross-examination. 124 S. Ct. at 1374. The Court left "for another day efforts to spell out a comprehensive definition of 'testimonial,'" but it explained that the term "applies at a minimum to prior testimony at a preliminary hearing, before a grand jury, or at a former trial; and to police interrogations." *Ibid.* The Court also cited, as examples of "plainly testimonial statements" that had been admitted without the opportunity for cross-examination, Second Circuit decisions admitting plea allocutions to show the existence of a conspiracy. *Id.* at 1372 (citing, *inter alia*, *United States* v. *Petrillo*, 237 F.3d 119, 122-123 (2d Cir. 2000), and *United States* v. *Moskowitz*, 215 F.3d 265, 268-269 (2d Cir. 2000)); cf. Pet. App. 2a (citing *Petrillo* and *Moskowitz* in rejecting petitioner's claim).

There is no warrant for granting review of petitioner's claim under the Confrontation Clause. Peti-

tioner argued in the court of appeals that the admission of Rish's plea allocution required the government to immunize Rish so that he could testify at trial, and that the failure to grant Rish immunity caused a violation of, *inter alia*, petitioner's "confrontation rights." Pet. C.A. Br. 37-48; see Pet. App. 2a-3a. Insofar as petitioner adequately preserved the Confrontation Clause claim she now raises by arguing in the court of appeals that Rish should have been afforded immunity, petitioner did not raise that argument in the district court. As the court of appeals recognized, her claim therefore is reviewable only for plain error. *Id* at 2a.

To obtain review of a forfeited claim of error under Federal Rule of Criminal Procedure 52(b), petitioner must demonstrate that there has been (1) error, (2) that is plain, and (3) affects substantial rights. *Johnson* v. *United States*, 520 U.S. 461, 466-467 (1997); *United States* v. *Olano*, 507 U.S. 725, 731 (1993). Even if those conditions are met, the Court may exercise its discretion to notice a forfeited error only if the error "seriously affect[s] the fairness, integrity, or public reputation of judicial proceedings." *United States* v. *Cotton*, 535 U.S. 625, 631-632 (2002) (quoting *Johnson*, 520 U.S. at 467).

The admission of Rish's plea allocution constituted error under *Crawford*, see 124 S. Ct. at 1372, 1374, and the error is plain at this stage of the proceedings, see *Cotton*, 535 U.S. at 632; *Johnson* 520 U.S. at 467-468. But the error did not prejudice petitioner and therefore did not affect her substantial rights. See *id.* at 466-467; *Olano*, 507 U.S. at 734 (error must have "affected the outcome of the district court proceedings").

First, the statements from Rish's plea allocution were redacted to omit any reference to petitioner, and the district court instructed the jury to consider the

redacted statements solely to demonstrate the existence of the charged conspiracy, not to show that petitioner was a member of the conspiracy. The jury presumably followed that instruction. See, *e.g.*, *Jones* v. *United States*, 527 U.S. 373, 394 (1999); *Shannon* v. *United States*, 512 U.S. 573, 585 (1994). Petitioner has not explained how cross-examination of Rish could have called into question the veracity of his plea allocution statements concerning the existence of the charged conspiracy. See Pet. App. 3a (court of appeals explains that petitioner "did not demonstrate that Dr. Rish's testimony would have been exculpatory or otherwise material to her defense"). Petitioner argued in the court of appeals that cross-examination of Rish would have enabled her to question the "implication that [she] was a knowing participant in the charged conspiracy," Pet. C.A. Br. 38, but the statements were admitted only to establish the existence of the conspiracy.

The error also did not seriously affect the fairness, integrity, or public reputation of the proceedings because the evidence against petitioner was overwhelming. See *Cotton*, 535 U.S. at 632-633. The government presented a substantial case against petitioner independent of Rish's plea allocution. The government introduced a wealth of documentary and physical evidence, including the false claims submitted by LRMA to insurance companies, bank records relating to money laundering, and fabricated patient records. The government also presented the testimony of 28 witnesses, including a number of LRMA patients, who explained how petitioner convinced them to participate in the fraud, performed procedures on them that were misrepresented in LRMA's insurance claims, and later induced them to lie to insurance fraud investigators and the FBI. In addition, the government

called three former employees of LRMA, who further explained how petitioner performed many of the procedures at LRMA, oversaw the billing process, and systematically altered patient files in an effort to support the fraudulent bills after she learned that the clinic was under investigation. See Gov't C.A. Br. 3-20.

Finally, petitioner's claim lacks prospective importance. After *Crawford*, the Second Circuit has ruled that the introduction of a co-conspirator's plea allocution as substantive evidence of guilt violates the Confrontation Clause where the co-conspirator is unavailable to testify at trial and there has been no opportunity for cross-examination. *United States* v. *McClain*, No. 02-1093, 2004 WL 1682768 (2d Cir. July 28, 2004). The government does not intend in future prosecutions to seek to introduce a co-conspirator's plea allocution in those circumstances.

2. Petitioner renews her contention (Pet. 14-16) that the district court erred in excluding the dictation tapes from evidence. That fact-bound issue does not warrant review.

A district court has wide discretion in determining whether an item of evidence has been properly authenticated. See, *e.g.*, *United States* v. *DeJohn*, 368 F.3d 533, 542 (6th Cir. 2004); *United States* v. *Alicea-Cardoza*, 132 F.3d 1, 3 (1st Cir. 1997). Federal Rule of Evidence 901(a) provides that the authentication requirement is satisfied "by evidence sufficient to support a finding that the matter in question is what its proponent claims." A district court should admit a recording only if it is accurate, authentic, and trustworthy, see *DeJohn*, 368 F.3d at 542; *United States* v. *Panaro*, 266 F.3d 939, 951 (9th Cir. 2001), and an untrustworthy recording may be excluded, *United*

States v. *Jackson*, 208 F.3d, 633, 638 (7th Cir.), cert. denied, 531 U.S. 973 (2000).

The district court in this case did not abuse its discretion in excluding petitioner's dictation tapes for lack of authentication. Petitioner revealed the tapes to the prosecutors after the court's deadline for the parties to produce documents had passed. Brice testified that the original tapes were miniature cassettes, but petitioner sought to present full-sized tapes. Petitioner did not explain that her tapes were accurate copies of the originals or where she had obtained the tapes. Further, Brice testified that she did not begin transcribing tapes until the Summer of 1996, yet one tape presented by petitioner was purportedly from March 1996. See Gov't C.A. Br. 56. Further, as noted by the court of appeals, petitioner did not offer to authenticate the tapes by other means. Pet. App. 3a-4a.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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(2)

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In The
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SONIA LaFONTAINE,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

On Petition For Writ Of Certiorari
To The United States Court Of Appeals
For The Second Circuit

SUPPLEMENTAL BRIEF

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STATEMENT OF THE CASE

Introduction

This Supplement to the Petition for *Certiorari*, No. 03-1540, is submitted on behalf of Petitioner Sonia LaFontaine (hereinafter "Petitioner"), pursuant to Rule 15(8) of the Rules of the Supreme Court.[1]

Sonia LaFontaine's Petition for a Writ of *Certiorari* was filed on May 11, 2004. However, subsequent to that filing, new cases directly applicable to Petitioner's case have been decided, specifically: this Court's decision in *Blakely v. Washington*, __U.S.__, 124 S.Ct. 2531 (2004); and the Second Circuit Court of Appeals's decision in *United States v. Chin,* 371 F.3d 31 (2nd Cir. 2004).

This Court's decision in *Blakely* held that sentencing guidelines enhancements that required a higher sentencing

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[1] That Rule States, in relevant part:

> **Rule 15. Briefs in Opposition; Reply Briefs; Supplemental Briefs**
>
> 8. Any party may file a supplemental brief at any time while a petition for a writ of certiorari is pending, calling attention to new cases, new legislation, or other intervening matter not available at the time of the party's last filing. A supplemental brief shall be restricted to new matter and shall follow, insofar as applicable, the form for a brief in opposition prescribed by this Rule.

range based on findings by a judge, rather than a jury, and by a preponderance of the evidence, rather than beyond a reasonable doubt, violated the Sixth Amendment right to a jury trial. Here, as detailed below, Petitioner's sentence was increased substantially by such enhancements.

Also, the Second Circuit's decision in *Chin* makes clear that Second Circuit erred – by its own standards – in affirming the District Court's preclusion of evidence proffered by the defense based on concerns about the authenticity of the evidence under Rule 901, Fed.R.Evid.

The Facts Below

Because the Petition for *Certiorari* filed in this matter contains an extensive recitation of the facts of the case below, they will not be repeated here. Instead, those facts relevant to the arguments made in this Supplemental filing are incorporated into the arguments below.

REASONS FOR GRANTING THE WRIT

1. THECOURT'S DECISION IN *BLAKELY* INVALIDATES PETITIONER'S SENTENCE

Since this Court is fully familiar with its decision in *Blakely*, it will not be discussed further. In fact, since this Court has granted *certiorari* in two cases that may, within a short period of time, resolve the question whether *Blakely* applies to the United States Sentencing Guidelines (hereinafter "Sentencing Guidelines"), and, if so, to what extent, it is respectfully submitted that the Court should hold this Petition in abeyance until the decisions in those cases are decided. *See United States v. Booker*, ___ F.3d ___, 2004 WL 1535858 (7th Cir. 9, 2004), *cert. granted*, 2004 WL

1713654 and *United States v. Fanfan*, No. 04-105 (directly from the District of New Hampshire), *cert. granted*, 2004 WL 1713655 (August 2, 2004).

As a result, this Supplemental submission will simply enumerate the specific Sentencing Guidelines enhancements that were found by the sentencing court, and not the jury, and by a preponderance of the evidence, and not beyond a reasonable doubt. Those enhancements added 27 points to Petitioner's Offense Level, thereby increasing her sentencing range from 0-6 months (Level 6 Base Offense Level) to 135-168 months (Level 33 Adjusted Offense Level).

For example, since Petitioner was convicted, after trial, of fraud offenses (conspiracy to commit mail and health fraud, and substantive mail fraud), her Base Offense Level was 6 pursuant to §2F1.1(a) of the Guidelines.

The District Court then found, by a preponderance of the evidence, that the following Sentencing Guidelines enhancements applied:

(a) a loss amount of more than $2.5 million but less than $5 million, adding 13 Levels under §2F1.1(b)(1)(N);

(b) more than minimal planning, adding two Levels pursuant to §2F1.1(b)(2);

(c) conduct involving the conscious risk of serious injury to others, adding another two Levels pursuant to §2F1.1(b)(7)(A);

(d) a leadership role in an offense that included five or more participants, adding four more

Levels under §3B1.1(a); and

(e) obstruction of justice, adding six Levels pursuant to §§3C1.1 and 5K2.0.[2]

As a result, the maximum of Petitioner's sentencing range was increased by a factor of *28* (from six months to 168 months). Her minimum range was increased infinitely – from zero months to 135. Ultimately, her Guidelines sentence of 135 months' imprisonment was achieved only by making the sentences on certain counts consecutive to the sentences on other counts.

Consequently, the impact of the Sentencing Guidelines enhancements to which Petitioner was subjected due to a judge's findings made by the preponderance of the evidence standard, and which resulted in a 27-Level increase in her Guidelines range, was substantially more severe than that held unconstitutional in *Blakely*.

Accordingly, it is respectfully submitted that if the Court, in *Booker* and *Fanfan*, finds *Blakely* and its principles applicable to the Sentencing Guidelines, it should summarily remand this matter for re-sentencing consistent with those opinions.[3]

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[2] Two levels were attributable to the "Obstruction of Justice" enhancement in §3C1.1, and the additional four points represented an upward departure imposed pursuant to §5K2.0.

[3] Of course, Petitioner also has sought *certiorari* on issues that address the merits of her convictions, and which should also precipitate summary reversal under this Court's

2. THE SECOND CIRCUIT'S DECISION IN *UNITED STATES V. CHIN*

Petitioner argued below, and in her Petition for a Writ of *Certiorari*, filed with this Court on May 11, 2004, that the District Court, in precluding tape recordings proffered by the defense on the ground that they were insufficiently authenticated, denied Petitioner her Fifth Amendment right to present a defense.

On June 2, 2004, the Second Circuit Court of Appeals decided *United States v. Chin,* 371 F.3d 31 (2nd Cir. 2004). In *Chin,* the District Court refused to admit credit card receipts proffered by the defense in support of an alibi defense. The District Court precluded the evidence because it questioned the authenticity of the receipts, stating that the defendant "offer[ed] no evidence by any witness to show that . . . his signature was placed on them at the time and place he proffers." *Chin*, 371 F.3d at 36.

However, the Second Circuit reversed the conviction in *Chin* and ordered a new trial, finding that the District Court should have admitted the credit card receipts with an instruction to the jury as a guide in determining their reliability. *Chin*, 371 F.3d at 42.

In doing, the Second Circuit reaffirmed that Rule 901, Fed.R.Evid, "'does not erect a particularly high hurdle,' and that hurdle may be cleared by 'circumstantial evidence.'" 371 F.3d at 37, *quoting United States v. Dhinsa*, 243 F.3d 635,

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decision in *Crawford v. Washington*, 542 U.S. ___, 124 S. Ct. 1354 (2004), or the grant of *certiorari* for the other reasons stated in the Petition.

658-59 (2d Cir. 2001) (internal citation and quotation marks omitted).

The Court in *Chin* also explained that while there was evidence which contradicted the claims made by the defendant about where and when the receipts were signed, and/or even whether the defendant was the one who signed the receipts at all, "[t]hese doubts about the ultimate reliability of the receipts, however, do not justify their exclusion under Rule 901's minimal standards for authentication." *Chin*, 371 F.3d at 38.

Here, in contrast, the Second Circuit erected a far higher barrier to admissibility, and one that violated both the standards for admission under Rule 901 as well as Ms. LaFontaine's Fifth Amendment right to present a defense. The Second Circuit rejected Petitioner's claim that the District Court had required too high a threshold of authenticity, and stated that "[t]he [District] Court invited LaFontaine to use alternative means to authenticate the tapes, but she failed to do so." *United States v. LaFontaine*, 2004 WL 260645, at *2 (2nd Cir. 2004) (App. 3-4).[4]

However, the District Court had, in fact, ruled that because it found "sufficient doubt" as to the authenticity of the tapes, "absent firsthand testimony by the person who made the document [the tape]," they would not be admitted.

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[4]"A." refers to the Second Circuit's opinion below, which was reproduced in the Appendix (as App. 1-25) annexed to the Petition for a Writ of *Certiorari* filed May 11, 2004.

Tr. 2163.[5]

Thus, here, both the District Court and the Second Circuit failed to adhere to the standard enunciated in *Chin*, which is that "Rule 901's requirements are satisfied 'if sufficient proof has been introduced so that a reasonable juror could find in favor of authenticity or identification.'" 371 F.3d at 38, *quoting United States v. Pluta*, 176 F.3d 43, 49 (2d Cir. 1999) (internal citation and quotation omitted).

Accordingly, *Chin* makes it clear, as Petitioner claimed below, that the District Court's concerns about authenticity reflected more appropriately on the *weight* of the evidence, and not its threshold admissibility. Indeed, the government had previously stipulated to the identity of the voice on the tapes, and any further dispute was a matter for the jury to decide.

As a result, the District Court's standard for authentication exceeded that required under Rule 901, and, in requiring Petitioner to call (without success) an unavailable witness in order to establish authentication, the District Court magnified its error. As a consequence, Rule 901's standards were misapplied, and Petitioner was deprived of her Fifth Amendment right to present a defense.

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[5] "Tr." refers to the trial transcript in the District Court.

Conclusion

Therefore, for all the reasons set forth above, as well as those set forth in Petitioner's initial Petition, it is respectfully submitted that the Petition for a Writ of Certiorari should be granted.

Dated: 10 August 2004
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Respectfully submitted,

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